Supreme Court, U.S.
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No. 02-1309

In The

Supreme Court of the United States

DELBERT STANFIELD,

Petitioner,

v.

CITY OF FLORENCE, ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the allegation of satisfaction of conditions precedent to bringing the action are denied by a defendant in its Answer, must that denial be preserved in the pretrial order to place the matter in dispute and create an issue for trial.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiff-appellee Delbert Stanfield and (b) defendant-appellant City of Florence, an Alabama municipal corporation.

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PETITION FOR A WRIT OF CETIORARI

Petitioner Delbert Stanfield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1-6) was entered on December 5, 2002 and is not published. The judgment of the district court (Pet. App. 7-23) is also unpublished.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The case involves Federal Rules of Civil Procedure 1 and 16. The text of Rule 16 is set out in the appendix to this petition (Pet. App. 28-32).

STATEMENT OF THE CASE

This is a case brought by Delbert Stanfield against his employer, the City of Florence, Alabama, under the Age Discrimination in Employment Act, 29 U.S.C. §626 *et seq.* ("ADEA"). In his complaint, Plaintiff alleged that he was

denied a promotion by the City in violation of the ADEA. It was specifically alleged by Stanfield that he had met all conditions precedent to bringing this action, including the timely filing of a Charge of Discrimination with the Equal Employment Opportunity Commission and timely filing suit after receiving a Right to Sue Letter. (The complaint alleges that the Right to Sue letter was dated August 7, 2000 and the complaint was filed on August 21, 2000, well within the 90 day requirement).

In its Answer, the City generally denied all material allegations and specifically denied that conditions precedent had been satisfied. It also asserted numerous affirmative defenses.

After discovery was completed, a pretrial conference was held. Prior thereto, counsel for both Plaintiff and Defendant had prepared and submitted a proposed pretrial order setting out an agreed summary of the issues and position statements of each party. At the conference, the issues to be tried were discussed at length with the district judge. On August 20, 2001, the Court issued its Pretrial Order formally delineating the issues in dispute (Pet. App. 24-27).

The pretrial order clearly shows that the issues to be tried were whether Stanfield could establish a prima facie case of age discrimination; whether the city had age neutral reasons for denying him the promotion; and whether these proffered reasons were pretextual. There was nothing to indicate that satisfaction of conditions precedent was disputed. Particularly, the "Defendant's position" did not include a denial that the Complaint had been timely filed after receipt of the Right to Sue Letter. There was absolutely nothing stated by the City in its

position statement that placed that issue in dispute. It was obvious to counsel and the district judge that this was not in dispute and was not an issue to be tried. This is the very reason the City did not preserve it. Therefore, there was no issue to be tried relating to satisfaction of any condition precedent.

A bench trial was held in Florence, Alabama on September 5, 2001. Evidence was presented going to the matters made issues in the pretrial order. On September 22, 2001, the trial court issued its judgment ordering the City to place Stanfield in the position to which he was entitled, and pay him back-pay, attorney's fees and costs.

The City filed Motions for Judgment as a Matter of Law and raised each time the issue of plaintiff's failure to prove that he timely filed his complaint after receipt of the Right to Sue Letter. Each Motion was denied without opinion, the district judge exercising her discretion to hold that the matter was not an issue before the district court because it had not been preserved in the pretrial order.

The City appealed to the Eleventh Circuit which, in a per curium opinion, reversed the judgment of the district court (Pet. App. 1-6). Ignoring the pretrial order, and Fed. R. Civ. P. 1 and 16, the court held that whether Stanfield had filed suit timely after receipt of the Right to Sue Letter was an issue for trial. Despite the fact that the denial contained in the answer was not preserved in the pretrial order, the circuit court stated that the issue had not been waived because it was an issue to which Stanfield had the burden of proof. *Id.* at 6.

This case is not about whether filing suit within 90 days of receiving a Right to Sue Letter is a condition precedent in an age discrimination case. It most certainly

is. Rather, the case is about whether matters that are not the subject of honest disputes of fact or law and are not preserved in the pretrial order must still be proven at trial. Stanfield prevailed at trial. The district judge found that he was a victim of age discrimination. Now he is asking this Court to grant this petition so that a travesty of justice can be prevented.

REASONS FOR GRANTING THE WRIT

The Petition should be granted for two reasons. *First*, the Eleventh Circuit's decision conflicts with holdings of other circuits in two important respects. It carves out an exception to universal rule that an issue is waived if not included in the pretrial order. The Eleventh Circuit held that a party does not waive the issue if the opposing party has the burden of proof on the issue. This ruling directly contradicts holdings by the Fourth, Seventh and D.C. Circuits and weakens Fed. R. Civ. Pro. 16. The Eleventh Circuit's judgment also reverses the district court without finding an abuse of discretion. All circuit courts of appeal recognize that the district court must be given broad discretion in interpreting pretrial orders. There was no showing of abuse of discretion by the City and no finding of such by the circuit court.

Second, the Eleventh Circuit's decision decides an important issue of federal law that has not been, but should be, settled by this Court. A pretrial order is entered by the district court in most every civil case filed. It is crucial to the orderly and fair administration of justice that the law governing the effect of pretrial orders be clear and consistent.

I. Certiorari Is Warranted Because The Decision Below Conflicts With The Decisions Of Other Circuits.

The Eleventh Circuit held below that even though the City did not include the issue of whether Stanfield timely filed suit after the receipt of the Right to Sue Letter in its position statement, the issue was not waived because Stanfield had the burden of proof on that issue. The court cited *Pacific Indemnity Co. v. Broward County*, 465 F.2d 99, 103 (5th Cir. 1972) to support the ruling.

Further research has revealed one other circuit court decision holding that a party does not waive an issue as to which the other party has the burden of proof if the issue is not preserved in the pretrial order. *Ramada Development Co. v. Rauch,* 644 F.2d 1097, 1111 (5th Cir. 1981). The Fifth Circuit holdings conflict with the wording and spirit of Rule 16, as well as with decisions of the Fourth, Seventh and D.C. Circuits.

Smith v. Washington Sheraton Corp., 135 F.3d 779, 784 (4th Cir. 1998) was a premises liability case in which the plaintiff had the burden of proving the defendant owned or controlled the property where the accident occurred. The defendant did not raise this issue in the pretrial order and the court held it had waived the issue. "Even a prima facie element of the plaintiff's claim can be removed from dispute in this manner." *Id.* at 784.

In *McLean Contracting Co. v. Waterman Steamship Corp.*, 277 F.3d 477, 479 (4th Cir. 2002), plaintiff alleged that defendant was liable for the negligence of a third party under agency principles. Plaintiff had the burden of proof on this issue but there was nothing in the pretrial order indicating that this was disputed and therefore an

issue for trial. In affirming the district court's ruling that the defendant had waived the issue, the court stated:

> Waterman contends that the district court's reliance on the pretrial order to exclude its third-party contractor defense was an abuse of discretion because it improperly placed the burden upon Waterman to disprove the agency relationships asserted by McLean. Waterman correctly notes that, as a matter of settled agency law, the burden to prove agency falls upon McLean once the issue is in dispute. (Citations Omitted). The burden of proof on issues that have been placed in dispute, however, is independent of the burden to identify disputed issues. ... Requiring Waterman to point out that a dispute regarding agency exists does not impermissibly shift the burden of proof on the issue of agency; rather, it serves a legitimate interest of efficient judicial administration and allows the court and the parties to focus on the relevant issues for trial. See Fed. R. Civ. P. 16(c)(1) & notes to 1983 Amendment ("The reference in Rule 16(c)(1) . . . is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone."); *Huey v. UPS*, 165 F.3d 1084, 1085 (7th Cir. 1999) (holding that a local rule requiring the party to identify disputed issues of material fact or waive arguments related to those issues "contributes to the efficient management of judicial business"); *Morro v. City of Birmingham*, 117 F.3d 508, 515 (11th Cir. 1997) (noting that "[t]he use of shotgun pleadings in civil cases is a ubiquitous problem," making it "particularly important for district courts to undertake the difficult,

> but essential, task of attempting to narrow and define the issues before trial" (internal quotation marks omitted)); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1368 (11th Cir. 1988) ("Given the vast number of details competing for the attention of a federal district judge, reducing all issues to writing before the pretrial conference substantially assists the trial court in its ability to understand the issues and to prepare for trial.").

Id. at 479.

In *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1442-44 (7th Cir. 1995) the Seventh Circuit upheld the district court's exclusion of a defense theory for failure to include it in the pretrial order. Despite the fact that the plaintiff bore the burden of proof on the issue, the underlying purpose of Rule 16 required the defendant to preserve this issue.

The rule enunciated in *Smith, McLean Contracting,* and *Gorlikowski*, as opposed to the rule handed down by the Fifth Circuit in *Pacific Indemnity* and *Ramada Development* is much more in keeping with other well settled principles handed down in cases dealing with pretrial procedures and orders. Courts have consistently held that issues included in the pretrial order supercede the pleadings and those issues not presented are eliminated. *Hernandez v. Alexander*, 671 F.2d 402, 407 (10th Cir. 1982) (constitutional claim made in complaint but not included in pretrial order waived); *Howard v. Kerr Glass Manufacturing Co.*, 699 F.2d 330, 333 (6th Cir. 1983); *Pierce County Hotel Employees & Restaurant Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450*, 827 F.2d 1324, 1329 (9th Cir. 1984); *Flannery v. Carroll*,

676 F.2d 126, 129 (5th Cir. 1982); *Erff v. Markhon Industries, Inc.*, 781 F.2d 613 (7th Cir. 1986).

Also, it is well established that a party and the court must be able to rely on the other party's position statement and the pretrial order to inform them of what is in dispute. *Smith v. Washington Sheraton Corp.*, 135 F.3d at 784; *Pierce County Hotel Employees*, 827 F.2d at 1329. It is the responsibility of each party to see that all issues the party desires to litigate are included in the pretrial order. "Counsel bear a substantial responsibility for assisting the court in identifying the factual issues worthy of trial. If counsel fail to identify an issue to the court, the right to have the issue tried is waived." Notes of Advisory Committee on Rules, 1983 Amendment; see also *McLean Contracting*, 277 F.3d 477, 480 (4th Cir. 2002).

In its holding below, the Eleventh Circuit also failed to follow the well established standard for reviewing district court rulings relating to pretrial orders. Rulings concerning issues to be tried are left to the discretion of the district judge and should be disturbed only on a showing and finding that such discretion was abused. *Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir. 1979); 6A Wright, Miller & Kane, *Federal Practice and Procedure* §§ 1522, 1527. It is apparent that the district judge ruled that the issue of whether the complaint had been timely filed was not in dispute, was not an issue to be tried, and was therefore waived by the City. There has been no showing and no finding that this was an abuse of discretion. The decision conflicts with this law which has been in place in all circuits other than the Eleventh.

In its Answer, the City denied that Stanfield filed his complaint timely after receiving his Right to Sue Letter.

After discovery was conducted and the case was ready for trial, the parties and court went through the process outlined in Fed. R. Civ. Pro. 16. The City and its counsel did not preserve this issue in its position statement. It was not disputed. Stanfield and the district judge relied on the City's position statement included in the pretrial order to inform them of what was in dispute. Those issues included were the issues tried. The issue which was purposefully not included by the City was waived. The fact that the issue related to a matter to which Stanfield had the burden of proof should make no difference. The Eleventh Circuit's decision needs to be reviewed and the conflict between the circuits cleared up.

II. This Case Involves An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

Pretrial procedure is extremely important to litigants, attorneys and the federal court system. Hundreds of thousands of pretrial conferences are held annually and pretrial orders entered. It has long been recognized that this procedure is designed to weed out extraneous issues. This Court has held that the pretrial order "conclusively establishes" the disputed issues to be tried. *United States v. Hougham*, 364 U.S. 310, 315 (1960). "Once the pretrial order is entered, it controls the course and scope of the proceedings under Federal Rule of Civil Procedure 16(e), and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint." *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998). In this case, the omitted issue had been included in the City's answer and it is axiomatic that the rule stated in *Elvis* should be applied in the same way.

The effect of pretrial orders and the deference to be given district courts in interpreting and administering them are important issues that this court should address. If not reviewed, the decision below will confuse those involved in the states covered by the Eleventh Circuit. It also will directly conflict with what is arguably the most important purpose of the pretrial process; i.e., the elimination of issues that are not the subject of "honest disputes of fact or law." *FDIC v. Glickman*, 450 F.2d 416, 419 (9th Cir. 1971). The issue which was not included by the City in the pretrial order was not the subject of an "honest dispute" and was rightfully eliminated by the district judge. Plenary review of this case is needed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectively submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16617
Non-Argument Calendar

D. C. Docket No. 00-02321-CV-J-NW

DELBERT STANFIELD,

Plaintiff-Appellee,

versus

CITY OF FLORENCE, ALABAMA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed December 5, 2002)

Before EDMONDSON, Chief Judge, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Defendant-Appellant City of Florence, Alabama ("City") appeals the district court's order granting judgment to Delbert Stanfield ("Stanfield") in his employment

discrimination action, filed pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626.[1] City argues that the district court erred in denying its motion for judgment as a matter of law because Stanfield failed to satisfy conditions precedent to his ADEA claim.[2] Reversible error has been shown; we reverse and remand.

Stanfield asserted in his complaint, filed on 18 August 2000, that City discriminated against him on the basis of age when it failed to promote him to the position of special equipment operator ("SEO") despite the fact that Stanfield was more than qualified and experienced than the two men, both under the age of 40, who were promoted to the position. Stanfield contended, as part of his complaint, that he had filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and had received a right-to-sue letter, dated 7 August 2000. City answered the complaint and denied, among other things, Stanfield's allegation that he had exhausted these administrative prerequisites. City also demanded proof and raised an affirmative defense as to this issue.

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[1] We previously dismissed this appeal in part for lack of jurisdiction because the district court's 27 September 2001 ruling regarding attorneys' fees and costs was not final and the district court's 30 November 2002 final disposition of these matters did not render City's notice of appeal timely. But we concluded that the remainder of the 27 September order, including the award of back pay, was final and appealable.

[2] City also argues that the district court erred in allowing Stanfield to introduce evidence not initially disclosed or excluded pretrial. Because we conclude that the court committed reversible error in not granting City's motion for judgment as a matter of law, we need not decide these trial issues.

The district court conducted a bench trial. City orally moved for judgment as a matter of law at the close of Stanfield's case, which the district court summarily denied. City also filed a written motion for judgment as a matter of law after it presented its evidence. City asserted that Stanfield's complaint should be dismissed because Stanfield failed to produce sufficient evidence prior to or at trial to support his claim that he exhausted his administrative remedies. The district court again summarily denied City's motion; entered judgment in favor of Stanfield; and ordered City to reinstate Stanfield as a SEO and pay him back pay, attorneys' fees and costs. The district court also denied City's renewed motion.

City specifically contends on appeal that, because it challenged Stanfield's allegation in his complaint that he satisfied all administrative prerequisites, it shifted the burden to Stanfield to prove that these prerequisites had been satisfied. City further asserts that Stanfield's failure to introduce a right-to-sue letter from the EEOC, or even present testimony at trial that he received one, was grounds for granting City's motion for judgment as a matter of law. In reply to Stanfield's argument that City waived this prerequisite by not including it as an affirmative defense in the pretrial order, City argues that it could not waive an issue as to which Stanfield had the burden of proof.

We review a district court's denial of a motion for judgment as a matter of law *de novo*. *Gupta v. Florida Board of Regents*, 212 F.3d 571, 582 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076 (2001). We consider all of the evidence and reasonable inferences arising therefrom in the light most favorable to the nonmoving party. *Id.* We

will not substitute our own judgment for that of the fact-finder if its verdict is supported by sufficient evidence. *Id.*

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623(a)(1). But similar to actions filed pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, ADEA actions may not be brought more than 90 days after a plaintiff has received adequate notice that the EEOC has dismissed the charge. 29 U.S.C. § 626(e); *Santini v. Cleveland Clinic Florida*, 232 F.3d 823, 825 (11th Cir. 2000). And once the defendant contests this issue, the plaintiff has the burden of establishing that he met the 90-day filing requirement. *Green v. Union Foundry Co.*, 281 F.3d 1229, 1234 (11th Cir.), *cert. denied*, ___ S.Ct. ___ (15 October 2002):[3] *see also Maynard v. Pneumatic Products Corp.*, 256 F.3d 1259, 1264 (11th Cir. 2001) (affirming district court's grant of judgment as a matter of law to defendant because plaintiff failed to prove that he timely filed an EEOC charge).

But exhaustion of administrative remedies is not jurisdictional in nature; rather, filing a timely charge of discrimination and filing a complaint within 90 days of receipt of the notice-of-right-to-sue letter are conditions precedent to a discrimination claim. *Forehand v. Florida*

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[3] Although *Green* involved a Title VII claimant, we typically apply legal standards developed in Title VII and ADEA cases interchangeably. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001).

State Hospital at Chattahoochee, 89 F.3d 1562, 1569-70 (11th Cir. 1996) (Title VII claim). If the defendant does not deny the satisfaction of these preconditions "specifically and with particularity," the plaintiff's allegations are assumed admitted and the defendant cannot later assert that a condition precedent has not been met. *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982) (citing to Fed.R.Civ.P. 9(c)). A party, therefore, cannot wait until after trial to take issue with the opposing party's general averment that the conditions precedent have been satisfied. *Id.*

Here, City correctly asserts that, by contesting in its answer whether Stanfield exhausted his administrative remedies and timely filed his complaint, it shifted the burden to Stanfield to establish that he met the 90-day filing requirement. *See Green*, 281 F.3d at 1234. And Stanfield failed to meet this burden at trial by introducing a copy of his right-to-sue letter. Although Stanfield responds that City was aware that Stanfield had satisfied all necessary conditions precedent, it has failed to point to any evidence in the record supporting this assertion.

Stanfield's alternative response, that City waived this argument by not raising it as an affirmative defense in the district court's pretrial order, also fails. Citing to *Hodges v. United States*, 597 F.2d 1014, 1017-18 (5th Cir. 1979), Stanfield contends that courts usually preclude a new claim or defense where it is first presented at trial without prior mention of the claim or defense in either the pleadings or the pretrial order. But, as discussed above, City contested whether Stanfield satisfied this condition precedent in its answer. And City could not waive or admit an issue as to which Stanfield had the burden of proof by failing to include the issue in the pretrial order. *See Pacific*

Indem. Co. v. Broward County, 465 F.2d 99, 103 (5th Cir. 1972) (nothing in Fed.R.Civ.P. 16 suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pre-trial stipulated list of remaining issues).

Because Stanfield failed to satisfy a condition precedent to filing his ADEA claim, i.e. proving that he filed his claim within 90 days of the EEOC's dismissal of the charge, and City did not waive this issue, the district court erred in denying City's motion for judgment as a matter of law. We reverse the judgment of the district court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

DELBERT STANFIELD Plaintiff, vs. CITY OF FLORENCE, ALABAMA, a municipality, Defendant.	)))) CV 00-J-2321-NW))))

JUDGMENT

(Filed Sep. 27, 2001)

This cause comes on to be heard at a non-jury trial on plaintiff's complaint, defendant's answer and testimony and evidence presented in open court. Plaintiff claims that defendant discriminated against him because of his age when defendant failed to promote the defendant [sic] to the position "Apprentice, Special Equipment Operator" in August of 1999 in violation of 29 U.S.C. § 621 *et seq.*, (hereinafter referred to as "ADEA"). Defendant denies the plaintiff's claim.

Factual Background

Plaintiff was born July 3, 1949, and was 50 years old at the time he was considered for the position in question. He started working on his father's farm equipment when he was 7-8 years old including tractors, combines, cotton pickers, farm trucks, and trailers. In 1967 he left Alabama and moved to Oregon. He worked for a manufacturer of paintbrush handles where he drove forklifts and trucks

from 1967 until 1968. In 1968 he went to work for Publishers Paper Co. cutting timber and processing lumber. In that job plaintiff operated dozers, trucks, heavy equipment, cranes, and trucks. Plaintiff worked for Publishers Paper Co. for ten years, until it closed down. Plaintiff moved to Nevada and went to work for Don Woods Construction in 1979. While working there plaintiff operated petty booms, that is equipment which sets beams and other support structures used in building a mall, as well as large forklifts. In 1980 when this job ended, plaintiff moved back to Alabama. Before beginning to work for defendant, plaintiff held two positions, one with Jeffrey Steel where he stacked steel and drove a truck and then one with Southeastern Tool and Dye where he hauled steel, drove a truck and operated a forklift. Plaintiff obtained a commercial drivers license, as soon as it became required, to make himself more marketable for promotions.

Plaintiff was employed by defendant's electricity department on September 30, 1983. He was hired as an apprentice groundman with the tree crew, and later through regular promotions topped out as a climber/tree trimmer in October of 1985. Plaintiff's Exhibit 1. His job entailed climbing trees, trimming trees, running the bucket truck over and between hot lines and running the chipper truck. Additionally, plaintiff helped other electricity department crews during storms. He regularly drove the department's trucks, hauled equipment behind trucks and operated bucket trucks on an almost daily basis.

In early 1990 plaintiff applied for a position as "Skilled Utility Worker" in the maintenance department. He was 40 years at the time, and could "make a little more money" in that position. He did not get that promotion.

Phillip South, who at that time was 26 years old, got that position.

However, later that year plaintiff applied for and was promoted to foreman/tree trimmer with defendant's electricity department. Plaintiff's Exhibit 1. In that position plaintiff drove and operated the department's heavy equipment and supervised and trained his crew.

In September of 1991 plaintiff applied for the position of meter reader with the defendant's electricity department. Plaintiff testified that he sought that position because he would earn $4.00 more per hour and be a member of the union. He obtained that position.

In 1992 he applied for the position as lineman with defendant's electricity department. There were two openings. Plaintiff sought this position because he "could make a lot more money." Plaintiff did not get that position. Two other employees, both under 40 years of age, were chosen by defendant. Plaintiff testified he has worked as a meter reader since 1991.

In August of 1999 plaintiff applied for the position in question, "Apprentice, Special Equipment Operator" with defendant's electricity department. There were two slots to be filled.

Plaintiff testified he felt very qualified for that position. He had worked with the equipment used in that position during various storms. He had operated a line truck, dug holes for setting of poles, set poles and transformers. Plaintiff testified that he had also operated equipment identical to the equipment involved in this position when he worked for Don Woods Construction. He testified that he had helped set poles and stretch wire,

and that those duties were identical to the duties involved in the position in question.

The job was for an apprentice position. The apprentice position would last three years.

The position was posted in accordance with defendant's usual job posting policy. Defendant's Exhibit 1. A job description was attached. Defendant's Exhibit 2.

Defendant's personnel and insurance manager, Dr. Sandra Sockwell, testified that defendant's Manual for Supervisors and Employees contains the policies and procedures to be followed by defendant in filling its job openings. Plaintiff's Exhibit 4. In particular, she testified that the provisions entitled "Conditions of Employment" are to be interpreted *in pari materia* with the provisions entitled Equal Employment Opportunity Policy. Plaintiff's Exhibit 4 at 2. Pursuant to this manual, the defendant shall:

"A. . . . develop and maintain descriptions of each job position in the City's service. These descriptions will include a list of representative tasks normally assigned to or associated with the job position.

B. Job positions will be filled, whenever, possible, with the most qualified eligible applicants.

C. In filling classified vacancies above entry level, first consideration will be given to qualified City employees. Promotion to vacant positions will be based on:

1. Quality of past performance.

2. Potential, as determined by interview and/or examination procedures; and

3. If all other factors are equal, the City may consider an employee's length of continuous employment in City employment." Plaintiff's Exhibit 4 at 2.

The provision of the manual to which Dr. Sockwell referred dealing with defendant's Equal Employment Opportunity Policy conspicuously omits "age" as a factor the City is prohibited from using as a basis for discrimination. Plaintiff's Exhibit 4 at 2.[1]

Dr. Sockwell received 29 applications. Plaintiff's Exhibit 6. Plaintiff was 50 years old at the time of his application and had worked for defendant for 16 years.[2]

Dr. Sockwell received all the applications, which reflected the applicant's birth date. The application also reflected the applicant's social security number. Dr. Sockwell stated that the reason the applicant's birth date was on the application was to distinguish applications from persons with the same or similar names.[3]

Dr. Sockwell ranked the applicants according to their qualifications and sent a list of ten names to Jack Hilliard

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[1] The court notes that in the job posting itself, the defendant states: "The City of Florence does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in employment or the provision of services." Defendant's Exhibit 1.

[2] Only one other applicant was older than plaintiff and had worked longer for defendant. There were four employees who had worked longer than plaintiff for defendant, but they were all younger than plaintiff.

[3] One of the decision makers, Charles W. Rasch, Jr., testified that such applications could be distinguished by the applicant's social security number and agreed it was unnecessary to have access to the applicant's age and birth date.

who is in charge of defendant's utilities, not just the electricity department.

Dr. Sockwell testified that in making up this list of ten applicants from their application she had access to their age, although she now has no idea about their age. Hilliard requested that two more names be added to the list of ten who were scheduled for interviews. Those two were Robert Gamble and Joey Bates. Dr. Sockwell could not explain how Hilliard would have known that these two persons were among the 29 applicants since their names were not on the list of ten scheduled for interviews, nor why he requested that their names be added to the list.[4] Plaintiff was not among the ten or twelve scheduled for interviews. On July 7, 1999, Richard Morissey, manager of defendant's electricity department, requested that Dr. Sockwell send a list of names of the remaining applicants. Plaintiff's Exhibit 9. All 29 applicants were interviewed by Morissey, Charles W. Rasch, Jr., director of engineering, and Glendon Jackson, general foreman of overhead construction. As a result of the interviews and review of applications, as well as defendant's policy and procedures as stated in defendant's manual, these three supervisors, who were the decision makers on behalf of defendant, hired Rowland Randall White, age 41 years at the time of his promotion, and Phillip South, age 35 years. Both White and South attached resumés to their applications. Defendant's Exhibits 5 and 6. Dr. Sockwell testified all applications had an up-to-date status report of their year-to-date sick leave, because "abuse of sick leave" was considered in

[4] Richard Morissey testified that Robert Gamble is a black employee.

reviewing applications. Additionally, she testified that § 8 on the "Personnel Action Request Form" entitled "Justification or Comment" was required to be filled out by the officials making the personnel action, in this case filling the position as Apprentice, Special Equipment Operator. However, it was not filled out in either Personnel Action Request Form promoting White or South. Thus no written criteria or justifications used by the three supervisors in filling those positions were available for the court's review or to corroborate their statements that "age of the applicant" was not considered in the appointment process.

All applicants were asked the same questions. Plaintiff testified that mainly Morissey and Jackson asked questions of him. His interview lasted 35-40 minutes. Plaintiff testified that everyone who worked with him in the tree crew job, except plaintiff, is a lineman today. Morissey's notes and Jackson's notes from the interviews reflect their evaluation of the various applicants. Defendant's Exhibit 7 and Plaintiff's Exhibit 11 respectively. Plaintiff received another applicant's letter of rejection. He went to see Jackson and requested a letter of his own. By that time plaintiff had learned who had been selected to fill the two positions. Plaintiff testified that he believed he did not get the position because of his age, and filed an EEOC charge. Plaintiff's Exhibit 7. He stated that he has been turned down for every promotion he has applied for since he turned 40 years old except the position of meter reader. Plaintiff testified that Morissey asked him several times during the interview whether or not he understood it would take a full three years for him to top out in that position. Plaintiff took Morissey's statements to mean that he would practically be "retirement age" at the time he would top out. Additionally, plaintiff testified that every

person plaintiff [sic] hired for positions for which plaintiff has applied has been younger than plaintiff.

Rowland White was 41 years old when he was selected for the position question, i.e. younger than plaintiff. He had worked for defendant since September of 1989, 6 years less than plaintiff. White was first hired as an apprentice groundman with the tree crew, then he became groundman/tree crew from 1989 until February of 1999, when he applied for and got the position of groundman/bush hog crew. White submitted his resumé with his application. White represented in his resumé that he had been employed with defendant since September of 1987[5] as groundman/bush hog crew. Both of these representations were incorrect. White did not become employed with defendant in 1987, nor had he been groundman/bush hog crew for 12 years in 1999. White stated in his application that he had "extensive skill and knowledge in operating all types of heavy equipment," had a commercial drivers license and was "knowledgeable and conscientious of safety and security procedures." White only had five months experience as groundman/bush hog crew in mid 1999. Prior to that time he was groundman/tree crew, never foreman as plaintiff. Additionally, White's personnel file reflects that his performance evaluation completed approximately *one month* before White was promoted to Apprentice, Special Equipment Operator, showed his principal strengths as "good at running saw, gets along well with crew members," and his principal weaknesses and suggestions for improvements as "needs to improve

[5] White testified that his wife had typed his resumé and she made a mistake on the year of employment.

efficiency." These evaluations were made by his foreman, Jimmy Bates, in the bush hog crew. An additional evaluation reflects that "Roland (sic) is a good worker with some areas of improvement needed."

The decision makers testified that they had White's personnel file, but had failed to discover this evaluation. Nevertheless, they found White more qualified for the position of Apprentice, Special Equipment Operator than plaintiff.[6]

South, who was selected by defendant to fill the other slot as Apprentice, Special Equipment Operator was 35 years old in August of 1999, and thus also younger than plaintiff. South was employed by defendant in January of 1990 as a "skilled utility worker." He had seven years less seniority than plaintiff. South worked in that position until defendant selected him for the position in question in August of 1999. South too attached a resumé to his application. In it he listed "[s]pecial skills necessary to complete current job functions are carpentry, concrete finishing, painting, plumbing, and explosives." He listed his equipment skills as "Backhoe, Air Compressor, Concrete Finishing Machine, Jack Hammer, Trencher, Dump Truck, Winch Fork Lift, Derrick and Bucket Truck, Tractor, Sandblaster, and Bulldozer."

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[6] Rasch testified that they had both White's and South's personnel file, but not plaintiff's because it was harder to get as he was not working at the electricity department in 1999, but with "joint operations." Yet plaintiff's personnel file shows him as an employee of the electricity department.

Morissey testified that he is the manager of the defendant's electricity department and his supervisor is Hilliard. Morissey was involved in filling these two positions because they were within the electricity department. Generally his recommendation of hire is followed by his supervisor. Morissey testified that he made the decision to interview all applicants, but had no knowledge of their age. Morissey stated that each of the three supervisors who interviewed the applicants rated them independently from each other on a scale of 1 to 5 with 5 being the best qualified. He testified that the consensus among the three decision makers was that White and South were the two most qualified applicants and that C.3 of the manual, that of "length of continuous employment with defendant," therefore, did not come into play. He stated they looked at some personnel files, but not plaintiff's, that they only looked at personnel files if they thought there was something in them that would have a negative impact on their decision and that he could not remember if he checked White's and South's personnel files. Morissey testified that he had no personal knowledge of the applicant's work history. Despite this lack of knowledge, Morissey rated the quality of plaintiff's past performance as "adequate." *See* Plaintiff's Exhibit 4 at 2 "Conditions of Employment" C.1. Yet he testified that plaintiff was an "excellent" employee. Morissey could not remember why he arrived at the conclusion that White and South were better qualified than plaintiff. He testified that he knew both White and South personally because they worked in the electricity department. He stated that the decision was "very close" when it came right down to it and that he had ranked plaintiff as #3. Morissey testified that what differentiated White and South from plaintiff was that they had shown they could do that job. Morissey was unaware of White's

evaluation one month earlier stating his strengths only as "good at running a saw" and "gets along well with crew members," and his principal weaknesses as "needs to improve efficiency." Nor was Morissey aware of the fact that South had never held the position of foreman.[7]

Glendon Jackson, general foreman/overhead construction, testified that defendant has five line crews and that each line crew consists of two linemen, one special equipment operator, one foreman, and one apprentice lineman. An apprentice period for special equipment operator is of 3 years duration. Jackson asked the interview questions and only those. He did not draft them. The only information he had available was what knowledge he acquired through the interview process and their applications. Jackson testified that he did not use defendant's manual. Plaintiff's Exhibit 4. Jackson rated White and South as the two most qualified applicants. He testified what distinguished them from plaintiff was the fact that their experience with heavy equipment was more recent than plaintiff's. "Recency" was the factor that distinguished them from plaintiff. Yet, Jackson testified he did not know how long White had worked on the bush hog crew operating a tractor. Specifically, he did not know White only had five months experience in that position.

Jackson denied that plaintiff went into details about his work experience in the interview. He denied that he was ever informed that plaintiff had operated a boom truck for defendant. Jackson did testify that he does not

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[7] Morissey had lost or been unable to locate the document on which he noted his ratings.

consider a tractor heavy equipment. Jackson denied that he considered anyone's age in selecting the individuals to fill the two slots.

Finally, Charles W. Rasch, Jr. testified regarding the selection process. In making his selections Rasch considered the interview itself, the application and the manual and criteria set forth therein. He was looking for the persons best suited for the position. Rasch was unable to locate any of his notes he made during the selection process. He stated he considered White and South the best. He further testified that he had no direct knowledge of plaintiff's work habits as plaintiff did not work in their department.[8] Rasch got White and South mixed up when he was asked specific questions regarding their experience with operating backhoes, tractors and bush hogs. He testified he had seen White operate tractor and bush hog equipment six, seven or eight years, when in fact White had only been in the bush hog crew position for five months. Rasch did testify that he did not recall seeing White operate any other equipment. Again, he opined that what set apart White and South was their current experience working with heavy equipment. He also believed that the quality of White's past performance was superior. Rasch did not review plaintiff's personnel file. Rasch did not notice the part of White's personnel file concerning his problem with "efficiency." However, he had available and reviewed both White's and South's personnel files, but not plaintiff's. He called a reference for White and South but

[8] Morissey and Rasch both stated that plaintiff did not work for the electricity department. Yet plaintiff's personnel file shows plaintiff as an employee of that department.

none for Stanfield. Rasch testified that he did consider the information in White's resumé which was false, namely that he allegedly had operated tractors for defendant for twelve years. He did also remember that plaintiff had operated heavy equipment for defendant 10-12 years ago, such as a bucket truck and chipper, but he could not remember what plaintiff told him in his interview. When Rasch was asked how old White and South were in 1999, instead of simply answering that question, he stated that he did not consider age of the applicants in making the selection.

Plaintiff's personnel file shows his experience with heavy equipment prior to his employment with defendant. Plaintiff's Exhibit 1. Plaintiff received Perfect Attendance Award for the years 1994, 1995, 1997, and 1999. Plaintiff's Exhibit 1. Plaintiff testified that he had received commendation by defendant for ten years with no accidents and many years perfect attendance award.[9] Yet none of this information was considered by defendant, because Morissey, Jackson and Rasch did not bother to send for plaintiff's personnel file.

Plaintiff's EEOC charge reflects on two occasions prior to the application in question, plaintiff had been told by a foreman that he "was too old for a position in the line crew." Defendant did not contradict this statement.

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[9] One of the factors which was considered by defendant was the applicant's knowledge of safety rules. Plaintiff's Exhibit 11.

LEGAL ANALYSIS

Plaintiff claims that he was not promoted to the position Apprentice, Special Equipment Operator, which is a position in the line crew, because of his age. In order to prevail on this claim, plaintiff must prove each of the following facts by a preponderance of the evidence: 1) that the plaintiff was within the protected age group, that is, begin at least 40 years of age, 2) that plaintiff was employed by defendant and was subsequently not promoted for the position of Apprentice, Special Equipment Operator, 3) that the plaintiff's age was a substantial or motivating factor that preempted defendant to take that action. *Pace v. Southern Railway System*, 701 F.2d 1383, 1386 (11th Cir. 1983). *See also, Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir. 1980). A plaintiff can establish a prima facie case of discrimination in promotion by providing evidence supporting the following four elements: 1) the plaintiff was a member of a protected class, i.e. over 40 years of age; 2) plaintiff was qualified for the position sought; 3) plaintiff was rejected for the promotion; and 4) the position was filled by someone outside the protected class. *Munoz v. Oceanside Resorts, Inc.*, 923 F.3d 1340 (11th Cir. 2000. *Standard v. A.B.E.I. Servs. Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998). However, the *McDonald Douglas/Price* test is "not the alpha and omega of possible tests in the age discrimination context." *Pace*, 701 F.2d at 1387. Rather, "such a determination turns on whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision." *Id.*

It is undisputed that plaintiff proved that he was within the protected age group; he was 50 years old in 1999. Plaintiff also proved that he was employed by

defendant and not promoted to the position of Apprentice, Special Equipment Operator in August of 1999. Plaintiff also proved by a preponderance of the evidence that he was qualified for the position. Morissey called him an excellent employee. All three decision makers stated it was a very close call between White, South and plaintiff. Plaintiff's personnel file and employment history show that he was qualified for the position. The only issue is whether or not plaintiff proved by a preponderance of the evidence that his age was a substantial or motivating factor that prompted defendant to take the action they did when they failed to select plaintiff.

Plaintiff may not establish that an employer's proffered reason is pre-textual merely by questioning the wisdom of the employer's reason.[10] *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997). Plaintiff must produce evidence by which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age. *Early v. Champion International Corp.*, 907 F.2d 1077, 1082 (11th Cir. 1990).

Although this court's function is not to question the wisdom of defendant's decision, the court can evaluate the legitimacy of defendant's explanations for the selections if made through its three decision makers.

Frankly, this court finds from all of the evidence presented at the non-jury trial that defendant's proffered reasons are false. The three decision makers' testimony regarding the reasons for finding White and South more

[10] Defendant's alleged reason was that White and South were more qualified than plaintiff.

qualified than plaintiff is simply unbelievable in light of plaintiff's own testimony, the testimony of White and South, and the documentary evidence. The fact that Morissey could not recall specific facts which lead him to conclude that White and South were more qualified than the plaintiff; the fact that none of the three decision makers remember specifically what they discussed with plaintiff and could not find their rating sheets; the fact that Rasch when asked to calculate White's and South's ages replied that he did not consider age a factor instead of calculating their ages; the fact that none of the decision makers checked plaintiff's personnel file because it was not "as easy" to get as those of White and South because plaintiff did not work for the electricity department; the fact that they checked White's file, but did not see the comment that he needed to improve efficiency; the fact that defendant failed to fill out the "justification and comments" section for White's and South's promotions; and the fact that plaintiff's personnel file shows that he had had no accidents over a ten year period, all makes this court question their veracity.

The issue then remains whether plaintiff proved that defendant's real reason for not promoting him was his age. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 147, 120 S.Ct. 2097, 2108-2109 (2000). Plaintiff testified he was the only employee of the ones who worked with him on the tree crew who had not be promoted to the line crew. He testified that he had not been promoted at all since becoming a meter reader. He understood Morissey's numerous statements to him during the interview that the apprentice period for the position in question was three years, as Morissey's opinion that he was basically too old for the position. Morissey did not specifically testify that

plaintiff's understanding of these comments was erroneous. He just stated that he did not base his decision on age, yet he could not recall why he arrived at the conclusion he did. Plaintiff had been told by a company foreman that he was too old for a position in the line crew. Plaintiff's Exhibit 7. Finally, plaintiff testified that every person defendant hired had been younger than plaintiff. Defendant did not even include "age" in its manual as a prohibited discrimination factor in employment or promotion of its employees.

The court finds that the real reason plaintiff was not promoted was his age. The court can arrive at no other logical explanation based on the evidence presented in this case.

It is therefore ORDERED that plaintiff shall forthwith be instated in the position of Special Equipment Operator. It is further ORDERED that he shall be entitled to back-pay damages from August 31, 2001 until this date, as August 31, 2001 is the date plaintiff would have topped out at his present salary had he been promoted as Apprentice, Special Equipment Operator in August of 1999. Plaintiff shall be entitled to his attorney's fees and costs and expenses of this action.

DONE and **ORDERED** this 27 day of September, 2001

/s/ Inge P. Johnson
Inge P. Johnson
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHWESTERN DIVISION

DELBERT STANFIELD, PLAINTIFF, VS. CITY OF FLORENCE, ALABAMA, DEFENDANTS.	)	CASE NUMBER: CV00-J-2321-NW (Filed Aug. 21, 1001)

PRETRIAL ORDER

A pretrial conference was held in the above case on August 20, 2001 wherein, or as a result of which, the following proceedings were held and action taken:

1. ***Appearances:*** Appearing at the conference were:

   James H. Starnes, for the plaintiff.

   Gregg L. Smith, for the defendant.

2. ***Jurisdiction and venue.*** Subject matter jurisdiction exists under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Personal jurisdiction and venue are not contested.

3. ***Consolidation,*** N/A.

4. ***Parties and trial counsel.*** Any fictitious defendants are hereby DELETED. The parties before the court are correctly named as set out below and the designated trial counsel for the parties are set out below:

PARTIES	TRIAL COUNSEL
Plaintiffs:	
Delbert Stanfield	James H. Starnes
Defendants:	
City of Florence, Alabama	Gregg L. Smith

5. ***Pleadings.*** The following pleadings have been allowed. Complaint on behalf of Plaintiff; Answer on behalf of the Defendant to the Complaint.

6. ***Statement of the Case.***

(a) ***Agreed summary.*** This case arises out of Plaintiff's claims that he was discriminated against on the basis of his age in violation of the ADEA when the City of Florence selected two younger male employees, both less than 40 years of age, for the position of Special Equipment operator. The promotion decisions were made in August, 1998. The Plaintiff, a long-time employee of the defendant, submitted an application for one of the two available positions and was interviewed by representatives of the defendant.

(b) ***Plaintiff's position.*** Plaintiff was passed over for promotion because of his age. Plaintiff was more qualified than both men who were given the promotions. His age was the reason he was not promoted. Defendant's position that the men promoted were equally or more qualified than Plaintiff is a pretext for discrimination. Plaintiff had been told in the past by management that he would not be promoted because he was too old. Plaintiff seeks to recover from the Defendant back pay and compensatory damages. Plaintiff also seeks reinstatement and other equitable relief, as well as costs, expenses and attorney fees.

(c) ***Defendant's position.*** Defendant followed its procedures in posting, interviewing and selecting the most qualified applicants for the positions. The two individuals selected were chosen for non-discriminatory reasons. All current City employees who applied for the positions were interviewed. It was agreed by the three supervisors who conducted the interviews and reviewed the applications that the Plaintiff was not the most qualified applicant for the positions and the two employees chosen were the most qualified applicants. The age of the Plaintiff was not considered in making the promotion decisions. No derogatory remarks about the Plaintiff's age were made by the decision-makers. Plaintiff cannot establish a prima facie case because he was not equally or more qualified than the employees selected for the positions. Additionally, Plaintiff has no evidence supporting the contention that the City's decisions were a pretext for discrimination.

7. ***Discovery and other pretrial features.***

(a) Discovery is completed. Plaintiff shall present defendant with a list of all witnesses he intends to call and all exhibits he intends to use for trial on or before August 21, 2001.

(b) The Standard Pretrial Procedures specified on Exhibit A hereto are adopted as part of this order.

(c) Pending discovery motions: None.

8. ***Trial.*** The parties expect the trial to last two days.

ORDERED this the 20 day of August, 2001 that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ Inge P. Johnson
UNITED STATES
DISTRICT JUDGE
INGE P. JOHNSON

FRCP 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time.

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use

of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a magistrate judge or master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for *adopting* special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable

issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is

made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Cross references to FRCP 16: ***Commentaries***. "The Scheduling Order & Pre-trial Conference," ch. 5-A, p. 187; 1993 Notes to FRCP 16, p. 1004; ***O'Connor's Federal forms – Civil Trials***, FORMS SA.

Source of FRCP 16: As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.